

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of

Carrier Current Systems, Including
Broadband over Power Line Systems

ET Docket No. 03-104

Amendment of Part 15 Regarding New
Requirements and Measurement Guidelines
for Access Broadband over Power Line
Systems

ET Docket No. 04-37

**PETITION FOR RECONSIDERATION
OF CURRENT TECHNOLOGIES, LLC**

February 7, 2005

Mitchell Lazarus
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0440
Counsel for CURRENT Technologies, LLC

TABLE OF CONTENTS

SUMMARY	1
DISCUSSION	3
A. The Commission Should Eliminate the Requirement for 30 Days' Advance Public Notice of BPL Installations	3
1. Advance public notice would not help to address the purpose of the rule	4
2. The requirement for advance public notice could impair BPL's competitive position in the marketplace	5
3. A requirement for advance public notice violates the Administrative Procedure Act	5
B. The Commission Should Eliminate the 18-Month Certification Deadline as to Shipment and Installation of BPL Equipment	7
CONCLUSION	10

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of

Carrier Current Systems, Including
Broadband over Power Line Systems

ET Docket No. 03-104

Amendment of Part 15 Regarding New
Requirements and Measurement Guidelines
for Access Broadband over Power Line
Systems

ET Docket No. 04-37

**PETITION FOR RECONSIDERATION
OF CURRENT TECHNOLOGIES, LLC**

Pursuant to Section 1.429 of the Commission's Rules, CURRENT Technologies, LLC, a leading provider of broadband over power line (BPL) technology, files this Petition for Reconsideration of the Commission's Report and Order in the above-captioned proceeding.¹

SUMMARY

CURRENT commends the Commission for its results in the BPL proceeding. Confronted by conflicting and strongly-held viewpoints, the Commission succeeded in crafting a set of rules that will enable BPL to go forward while fully protecting the legitimate interests of licensed users. The new regulatory framework will facilitate BPL's bringing reliable, economical broadband access to places that are not presently served, and will add new competition where service is currently available. In addition, BPL will help utilities to implement enhanced power distribution services such as automated meter reading, automated power outage and restoration detection, power quality monitoring, load management, and

¹ *New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems*, 19 FCC Rcd 21265 (2004) (Report and Order).

demand side management -- capabilities that not only extract added value from the installed electric distribution system, but also serve to protect U.S. critical infrastructure.

Notwithstanding its overall support of the Commission's effort and resulting rules, CURRENT submits two matters for reconsideration. This petition asks for a second look at two rules that, as crafted, will impede the efficient deployment of BPL without providing concomitant benefits.

First, CURRENT asks the Commission to rethink the requirement that disclosures of new BPL installations be placed in the public database 30 days before service begins. Giving public notice in advance does nothing to further the purpose of the database -- *i.e.*, it does not help a licensee to determine whether BPL can be the source of particular interference (inasmuch as BPL cannot be an interference source before it commences operations). But advance notice will impair BPL's competitive position. Incumbent broadband providers will have a full month to blanket BPL's target neighborhoods with cut-rate offers for immediate service, while BPL providers must stand by doing nothing. In any event, the requirement for advance public notice did not appear in the Notice of Proposed Rule Making (NPRM), so its adoption violates the Administrative Procedure Act (APA).

Second, the Commission should reconsider the rule requiring that BPL equipment manufactured, imported, marketed, or installed on or after July 7, 2006, be certified. (Marketing is defined to include shipment for sale or lease.) CURRENT seeks no modification of the manufacturing and importation provisions. But in order to ship and install only certified devices after July 7, 2006, BPL providers would have to empty the distribution pipeline of old product by that date and refill it with newly manufactured, certified product -- during a period when

deployments will be growing very fast. In practice, this would leave only about nine months to redesign, test, and complete the certification process for all components of a BPL system, including the advanced remote-control capabilities required under the new rules. The timetable may not be feasible.

As an alternative, CURRENT suggests the Commission retain the July 7, 2006, deadline for manufacture and importation, but allow BPL providers an additional 18 months, until January 7, 2008, before they must market (*i.e.*, ship) and install only certified devices. This approach is consistent with past Commission practice as to non-transmitter devices having no record of widespread harmful interference.

DISCUSSION

A. The Commission Should Eliminate the Requirement for 30 Days' Advance Public Notice of BPL Installations.

The rules require a BPL provider to place certain information about its installations in a public database.² CURRENT does not object to this requirement. But the rules also obligate the provider to supply this information to the database operator "within 30 days prior to initiation of service,"³ and require the database operator to make the information public within three days thereafter.⁴

² 47 C.F.R. Sec. 15.615(a). The information includes the provider's name, frequencies used, postal zip codes of the installations, equipment authorization data, contact information, and start date.

³ 47 C.F.R. Sec. 15.615(a).

⁴ 47 C.F.R. Sec. 15.615(b).

CURRENT seeks reconsideration of the 30-day prior notice provision on the grounds that it is contrary to the public interest, ineffective, and unlawfully promulgated.⁵

1. Advance public notice would not help to address the purpose of the rule.

The APA requires a rational connection between a problem and the rule intended to solve it.⁶

The stated purpose of the public database is to "ensure that any potential interference to licensed services from BPL operations can be adequately identified and quickly addressed."⁷ Licensed users will be able to "determine whether there may be Access BPL operations on particular frequencies within their local area"⁸ to help resolve "any incident of harmful interference . . . should it occur."⁹

⁵ CURRENT does not object to 30 days' prior consultation with public safety users and with certain federal Government and other radio service users as specified in the rules. 47 C.F.R. Secs. 15.615(e), (f).

On its face, the language of Section 15.615(a) -- requiring disclosure *within* 30 days prior to initiation of service -- might allow notification just before initiation of service. But text in the Report and Order is inconsistent with this interpretation. One passage requires provision of the database information "30 days prior to initiation of any operation or service." Report and Order at para. 85. A footnote adds, "Once the 30-day advance notification timeframe is over, the Access BPL operator can begin operations." *Id.*, n.176.

⁶ *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (2000) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action *including a rational connection between the facts found and the choice made*," quoting *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added)).

⁷ Report and Order at para. 83.

⁸ *Id.*

⁹ *Id.*

There can be no interference from BPL until BPL begins operations. Unlike contemporaneous disclosure, a requirement for advance notice of BPL installations does not contribute to the database's intended purposes, and as such is arbitrary and capricious.¹⁰

2. *The requirement for advance public notice could impair BPL's competitive position in the marketplace.*

Advance notice of BPL operations not only serves no purpose, but creates affirmative harm in the form of an unfair gift to broadband competitors. Thirty days is plenty of time for local competitive broadband providers to blanket upcoming BPL neighborhoods with cut-rate offers tied to service commitments, and thus to poison the market for BPL. While BPL operators are ready to compete with other broadband technologies on equal terms, and to cope with the multi-year head start that other broadband providers enjoy in most markets, BPL operators should not have to work against the competitive disadvantage of sharing their marketing plans with competitors in advance.

3. *A requirement for advance public notice violates the Administrative Procedure Act.*

The NPRM in this docket raised the possibility of a public database, but made no specific mention of advance public notice.¹¹

¹⁰ *AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) ("[W]e will not uphold an agency's action where it has failed to offer a reasoned explanation that is supported by the record.")

¹¹ "Entities operating Access Broadband over Power Line systems shall supply to a Federal Communications Commission/National Telecommunications and Information Administration recognized industry-operated entity, information on all existing, changes to existing and proposed Access BPL systems for inclusion in a data base. Such information shall include the installation locations, frequency bands of operation, and type of modulation used. No notification to the FCC is required." *Carrier Current Systems, Including Broadband over Power Line Systems*, 19 FCC Rcd 3335 at Appendix B (2004) (NPRM) (proposed Sec. 15.109(g)). *See*

CURRENT, along with many other parties, took vigorous part in the debate on what information the database should store, how it should be maintained, and who should have access to it.¹² But CURRENT did not challenge a requirement for advance notice, simply because the Commission had not proposed one.

The U.S. Court of Appeals precedent on the APA notice provisions is clear and consistent:

Notice of a proposed rule must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment.¹³

also NPRM at para. 31 (proposing to "require that Access BPL providers maintain a database of installation locations and technical information"); para. 43 (proposed requirement that "an Access BPL system operator would submit information on its system to an industry-operated entity").

¹² See Comments of Current Technologies, LLC at 20-23 (filed May 3, 2004); Reply Comments of Current Technologies, LLC at 27-29 (filed June 22, 2004); Letter from Mitchell Lazarus, Counsel for Current Technologies, LLC to Marlene H. Dortch, Secretary, FCC at 1-2 (filed July 23, 2004); Letter from Mitchell Lazarus, Counsel for Current Technologies, LLC to Marlene H. Dortch, Secretary, FCC at 2 (filed Oct. 1, 2004).

¹³ *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (remanding for adequate notice and comment). See also *Connecticut Light and Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 835 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). An agency may adopt a rule that is a "logical outgrowth" of a proposal, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983), but that doctrine does not apply where the agency "fail[s] to give interested parties sufficient notice of the form that the [rule] might take, *undermining the aims of meaningful participation and informed decisionmaking*." *Horsehead Resource Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (emphasis added), *cert. denied*, 513 U.S. 816 (1994).

Although a party requested a requirement for 30 days' advance submissions to the database,¹⁴ that does not constitute notice under the APA. Indeed, this proceeding drew numerous suggestions from parties, many of them hostile to BPL operation. The BPL industry did not address these suggestions because, being absent from the NPRM, they were not properly before the Commission. In just the same way, a party's proposal for advance database submissions is not an adequate basis on which to adopt a rule.

B. The Commission Should Eliminate the 18-Month Certification Deadline as to Shipment and Installation of BPL Equipment.

Section 15.37(l) provides:

All Access BPL devices that are manufactured, imported, marketed or installed on or after July 7, 2006, shall comply with the requirements specified in subpart G of this part, including certification of the equipment.¹⁵

Newly regulated BPL equipment will differ in important respects from that now in use. Just-added requirements include the capability to remotely reduce power and adjust operating frequencies,¹⁶ specific notch filtering characteristics,¹⁷ start-up requirements,¹⁸ and remote-control

¹⁴ Comments of National Telecommunications and Information Administration at 10-11 (filed June 4, 2004).

¹⁵ 47 C.F.R. Sec. 15.37(l). The date in the rule is 18 months after publication in the Federal Register. *See Broadband Power Line Systems*, 70 Fed. Reg. 1360, 1373 (Jan. 7, 2005).

¹⁶ 47 C.F.R. Sec. 15.611(c)(1).

¹⁷ *Id.*

¹⁸ 47 C.F.R. Sec. 15.611(c)(2).

shut-down.¹⁹ These require noteworthy re-engineering. CURRENT is nonetheless confident of meeting the July 7, 2006, certification deadline as to manufacture, and importation.

But CURRENT foresees a problem with *installing* and *marketing* only newly certified equipment after the deadline (to the extent that the term "marketing" includes shipment).²⁰ Greatly complicating this task is the growth of new deployments, and hence of equipment needs. BPL equipment manufacturers must allow time after certification to manufacture in commercial quantities and distribute new product, while emptying the pipeline of old product. CURRENT estimates that will take about nine months. In consequence, if all equipment to be shipped and installed after July 2006 must be certified under the new rules, then BPL manufacturers would have to redesign, test, and complete the certification process for all of the devices needed in a BPL system within about nine months of the rules' publication, so as to leave time for manufacture, shipping, and stocking by BPL system operators. CURRENT does not think the Commission meant to impose such an onerous schedule.

In the past, when the Commission tightened regulation of non-transmitter devices, it generally set timetables only for manufacture, not marketing. The initial regulation of personal computers, for example, gave manufacturers over 14 months to comply, with no cut-off for retail

¹⁹ 47 C.F.R. Sec. 15.611(c)(3).

²⁰ Section 2.803, captioned "*Marketing* of radio frequency devices prior to equipment authorization," provides that "no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or *distribute for the purpose of selling or leasing or offering for sale or lease*, any radio frequency device" that lacks the required equipment authorization. 47 C.F.R. Sec. 2.803(a) (emphasis added).

sales.²¹ Similarly, when the Commission first regulated scanning receivers to protect the privacy of cellular calls, it allowed manufacturers and importers over a year to comply, and put no time limit on other distribution.²² And when the Commission subsequently tightened those rules, it again regulated only manufacture and importation and forbore from imposing requirements on the distribution chain.²³

The only two exceptions we can find involved rules needed to correct actual and ongoing harmful interference, which is not the case here. Radar detectors, which had been shown to interfere with VSAT satellite receivers, had a 90-day marketing deadline.²⁴ Much earlier, when the Commission tightened the rules on CB receivers to eliminate interference to land mobile private radio, it imposed a 17-month marketing deadline.²⁵ Unlike BPL equipment, which can

²¹ *Restricted Radiation Devices and Low Power Communication Devices*, 79 F.C.C.2d 28, 56 (1979) ("There is no prohibition against the sale and resale after July 1, 1980 [the manufacturing cut-off date] of equipment manufactured prior to July 1, 1980 subject only to the non-interference requirement of Sec. 15.3.") The cut-off date was later extended to January 1, 1981. *Restricted Radiation Devices and Low Power Communication Devices*, 79 F.C.C.2d 67, 90 (1980).

²² *Amendment of Parts 2 and 15 to Prohibit Marketing of Radio Scanners Capable of Intercepting Cellular Telephone Conversations*, 8 FCC Rcd 2911, 2913 (1993), *recon. denied*, 9 FCC Rcd 3386 (1994).

²³ *Amendment of Parts 2 and 15 to Further Ensure That Scanning Receivers Do Not Receive Cellular Radio Signals*, 14 FCC Rcd 5390, 5403 (1999), *recon. on other grounds*, 16 FCC Rcd 11373 (2001).

²⁴ *Review of Part 15*, 17 FCC Rcd 14063 (2002) (60 days), 17 FCC Rcd 17003 (2002) (extending by 30 days).

²⁵ *Revision of Part 15 to Extend the Receiver Certification Program, to Revise the Technical Specifications for Receivers, and to Make Other Changes*, 60 F.C.C.2d 687 (1976), *clarified*, 62 F.C.C.2d 693 (1976).

be marketed only to BPL providers and their utility partners,²⁶ both of these cases involved consumer products sold in the millions, which would have been impossible to track or recall. Moreover, in both cases the interference was not wholly speculative, as here, but widely reported. Neither of these is sound precedent for BPL.

In short, requiring equipment that is shipped or installed after the July 7, 2006, deadline to comply with the new rules is a burden without a benefit. We urge the Commission to limit Section 15.37(l) to manufacture and import. At the same time, however, CURRENT would not oppose a later and more realistic deadline for shipping and installation. We propose setting that date at 18 months beyond the manufacture/import deadline, or January 7, 2008.

CONCLUSION

The Commission did an excellent job in this proceeding of balancing interests between facilitating the deployment of BPL and protecting licensed users from harmful interference. But the resulting rules need two revisions. The requirement that BPL providers disclose their marketing plans in advance will hinder competition without resolving interference, and should be dropped. And the requirement that BPL equipment shipped or installed after July 7, 2006, be certified is impractically burdensome. We ask the Commission to adjust this provision as well.

Respectfully submitted,

Mitchell Lazarus
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0440
Counsel for CURRENT Technologies, LLC

February 7, 2005

²⁶ 47 C.F.R. Sec. 15.609.

COURTESY SERVICE LIST

Chairman Michael Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Edmond J. Thomas, Chief, OET
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Julius P. Knapp, Deputy Chief, OET
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Bruce A. Franca, Deputy Chief, OET
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

James D. Schlichting, Deputy Chief, OET
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Alan J. Scrim, Chief
Policy and Rules Division
Office of Engineering & Technology
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Geraldine A. Matis, Deputy Chief
Policy and Rules Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ira R. Keltz, Deputy Chief
Policy and Rules Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Karen E. Rackley, Chief
Technical Rules Branch
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John A. Reed
Technical Rules Branch
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Anh Wride
Technical Rules Branch
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 2055